

Introduced by Senator Corbett

February 16, 2011

An act to amend ~~Section 212 of~~ Sections 1174.5 and 1175 of, and to add Sections 226.8, 1174.1, and 2753 to, the Labor Code, and to add Section 9620 to the Unemployment Insurance Code, relating to employment.

LEGISLATIVE COUNSEL'S DIGEST

SB 459, as amended, Corbett. Employment: ~~payment of wages independent contractors.~~

(1) Existing law prescribes comprehensive requirements relating to minimum wages, overtime compensation, and standards for working conditions for the protection of employees applicable to an employment relationship.

This bill would prohibit willful misclassification, as defined, of employees as independent contractors. The bill would authorize the Labor and Workforce Development Agency to assess specified civil penalties from persons or employers violating the bill.

This bill would provide that a person who, for money or other valuable consideration, knowingly advises an employer to treat an individual as an independent contractor to avoid employee status for the individual shall be jointly and severally liable with the employer if the individual is not found to be an independent contractor. This bill would exempt from the provisions regarding joint and several liability a person who provides advice to his or her employer or an attorney who provides legal advice in the course of practicing law.

(2) Existing law requires every person employing labor in this state to furnish reports or information to the Industrial Welfare Commission. Existing law requires that person to permit a member of the commission or employees of the Division of Labor Standards Enforcement within the Department of Industrial Relations free access to the place of business or employment of that person to secure information or make an authorized investigation. That person is required to keep a record showing the names and addresses of all employees employed, and keep, for a period of not less than 2 years, at a central location in the state or at the plants or establishments at which employees are employed, payroll records showing the hours worked daily by and the wages paid to employees employed at the respective plants and establishments. Under existing law, a person who willfully fails to maintain these records or permit a member of the commission or employees of the division to inspect records is subject to a civil penalty of \$500. A person who neglects or refuses to furnish the information requested by the commission, refuses access to his or her place of business, hinders the commission or employees of the division, or fails to keep any records required by this provision is guilty of a misdemeanor.

This bill would require a person employing labor in this state to provide to an individual hired as an independent contractor, when that individual is hired, a form that includes a notice that the individual has been hired as an independent contractor, a statement explaining the impact that the individual's status as an independent contractor has on his or her tax obligations and eligibility for labor and employment protections, and a notice of the individual's ability to seek advice from the Employment Development Department or the Labor Commissioner as to whether the individual is properly classified as an independent contractor. The bill would require the person employing labor in this state to maintain, for a period of no less than 2 years, records of the independent contractors hired by that person which include specified information concerning each independent contractor, and to make these records available for inspection by a member of the commission or an employee of the Department of Industrial Relations or the Employment Development Department. The bill would provide that a person who willfully fails to maintain these records or permit a member of the commission or employees of those departments to inspect those records is subject to a civil penalty of \$500. The bill would also provide that a person who neglects or refuses to furnish information requested under this provision, refuses access to his or her place of business, hinders

the commission or employees of those departments, or fails to keep any records required by this provision is guilty of a misdemeanor. By expanding the definition of an existing crime, the bill would impose a state-mandated local program.

(3) Under existing law, the Employment Development Department has the powers and duties necessary to administer the reporting, collection, refunding to the employer, and enforcement of taxes required to be withheld by employers.

The bill would additionally require the Employment Development Department to develop a form that includes a notice to an independent contractor regarding the impact that status as an independent contractor has on the individual's tax obligations and eligibility for labor and employment protections, and a notice that the independent contractor may seek advice from the Employment Development Department or Labor Commissioner as to whether the individual is properly classified as an independent contractor. The bill would require the Employment Development Department to process a request for advice by an individual regarding whether that individual is an independent contractor or employee, and to take all steps reasonably necessary to carry out the duties described in these provisions.

(4) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

~~Existing law prohibits a person or his or her agent or officer from issuing in payment of wages due (1) an acknowledgment of indebtedness unless it is negotiable and payable in cash at an established place of business in the state with a specified name and address and at the time of issuance and for at least 30 days thereafter and (2) a thing redeemable in merchandise or otherwise than in money.~~

~~This bill would make nonsubstantive changes to those provisions.~~

Vote: majority. Appropriation: no. Fiscal committee: ~~no~~-yes.
State-mandated local program: ~~no~~-yes.

The people of the State of California do enact as follows:

1 **SECTION 1.** *Section 226.8 is added to the Labor Code, to read:*

1 226.8. (a) *It is unlawful for any person or employer to engage*
2 *in any of the following activities:*

3 (1) *Willful misclassification of an employee as an independent*
4 *contractor.*

5 (2) *Charging an employee who has been willfully misclassified*
6 *as an independent contractor a fee, or making any deductions from*
7 *compensation, for any purpose, including for goods, materials,*
8 *space rental, services, government licenses, repairs, equipment*
9 *maintenance, or fines arising from the employee's employment*
10 *where the employer would have been in violation of the law if the*
11 *employee had not been misclassified.*

12 (b) *If the Labor and Workforce Development Agency, or any of*
13 *its departments, divisions, commissions, boards, or agencies, or*
14 *a court finds that person has engaged in any of the enumerated*
15 *violations of subdivision (a), a civil penalty of not less than five*
16 *thousand dollars (\$5,000) and not more than fifteen thousand*
17 *dollars (\$15,000) shall be assessed against the person for each*
18 *violation, in addition to any other penalties or fines permitted by*
19 *law.*

20 (c) *If the Labor and Workforce Development Agency, or any of*
21 *its departments, divisions, commissions, boards, or agencies, or*
22 *a court finds that person has engaged in any of the enumerated*
23 *violations of this section and there is evidence that the person has*
24 *engaged in or is engaging in a pattern or practice of these*
25 *behaviors, a civil penalty of not less than ten thousand dollars*
26 *(\$10,000) and not more than twenty-five thousand dollars*
27 *(\$25,000) shall be assessed against the person for each violation,*
28 *in addition to any other penalties or fines permitted by law.*

29 (d) *For purposes of this section, "willful" means voluntary and*
30 *intentional.*

31 (e) *Nothing in this section is intended to limit any rights or*
32 *remedies otherwise available at law.*

33 SEC. 2. *Section 1174.1 is added to the Labor Code, to read:*

34 1174.1. (a) *A person employing labor in this state shall provide*
35 *to an individual hired as an independent contractor, when the*
36 *individual is hired, a form developed by the Employment*
37 *Development Department that includes all of the following:*

38 (1) *A notice that the individual has been hired as an independent*
39 *contractor.*

1 (2) *The factors the Employment Development Department uses*
2 *to determine whether a person is an employee or an independent*
3 *contractor.*

4 (3) *A statement explaining the impact that the individual's status*
5 *as an independent contractor has on his or her tax obligations*
6 *and his or her eligibility for labor and employment protections.*

7 (4) *A notice of the individual's ability to seek advice from the*
8 *Employment Development Department or the Labor Commissioner*
9 *as to whether that individual is properly classified as an*
10 *independent contractor. The notice shall provide the telephone*
11 *number for both the Employment Development Department and*
12 *the Labor Commissioner.*

13 (b) (1) *A person employing labor in this state shall maintain,*
14 *for not less than two years, records of all independent contractors*
15 *hired by that person. The records shall include the name, address,*
16 *social security number, and, if applicable, federal tax identification*
17 *number of each independent contractor.*

18 (2) *A person employing labor in this state shall make the records*
19 *described in paragraph (1) available, upon request, for inspection*
20 *by a member of the commission or an employee of the Department*
21 *of Industrial Relations or the Employment Development*
22 *Department.*

23 SEC. 3. *Section 1174.5 of the Labor Code is amended to read:*

24 1174.5. ~~Any~~ *A person employing labor who willfully fails to*
25 *maintain—~~the~~, in an accurate and complete fashion, the records*
26 *required by subdivision (c) of Section 1174 or accurate and*
27 *complete records required by subdivision or (d) of Section 1174*
28 *or subdivision (b) of Section 1174.1, or to allow—~~any~~ a member of*
29 *the commission or employees of the—~~division~~ Division of Labor*
30 *Standards Enforcement to inspect records pursuant to subdivision*
31 *(b) of Section 1174 or a member of the commission or employees*
32 *of the Department of Industrial Relations or the Employment*
33 *Development Department to inspect records pursuant to*
34 *subdivision (b) of Section 1174.1, shall be subject to a civil penalty*
35 *of five hundred dollars (\$500).*

36 SEC. 4. *Section 1175 of the Labor Code is amended to read:*

37 1175. ~~Any~~ *A person, or officer or agent thereof, is guilty of a*
38 *misdemeanor who does any of the following:*

39 (a) *Neglects or refuses to furnish—the information requested*
40 *under the provisions of pursuant to Section 1174 or 1174.1.*

(b) Refuses access to his *or her* place of business or employment to any member of the commission or employee of the ~~Division of Labor Standards Enforcement~~ *Department of Industrial Relations or Employment Development Department* when the member or employee is administering or enforcing this chapter.

(c) Hinders ~~such~~ that member; or employee ~~in~~ from securing information authorized by Section 1174 *or 1174.1*.

(d) Fails to keep any of the records required by Section 1174 *or 1174.1*.

SEC. 5. Section 2753 is added to the Labor Code, to read:

2753. (a) A person who, for money or other valuable consideration, knowingly advises an employer to treat an individual as an independent contractor to avoid employee status for that individual shall be jointly and severally liable with the employer if the individual is found not to be an independent contractor.

(b) This section does not apply to the following persons:

(1) A person who provides advice to his or her employer.

(2) An attorney authorized to practice law in California or another United States jurisdiction who provides legal advice in the course of the practice of law.

SEC. 6. Section 9620 is added to the Unemployment Insurance Code, to read:

9620. The Employment Development Department also has the following power and duties:

(a) To develop the form described in subdivision (a) of Section 1174.1 of the Labor Code.

(b) To process a request for advice by an individual as to whether that individual is an independent contractor or employee.

(c) To take all steps reasonably necessary to carry out the duties described in Section 1174.1 of the Labor Code.

SEC. 7. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

1 SECTION 1. ~~Section 212 of the Labor Code is amended to~~
2 ~~read:~~

3 212. (a) ~~A person, or agent or officer thereof, shall not issue~~
4 ~~in payment of wages due, or to become due, or as an advance on~~
5 ~~wages to be earned:~~

6 ~~(1) An order, check, draft, note, memorandum, or other~~
7 ~~acknowledgment of indebtedness, unless it is negotiable and~~
8 ~~payable in cash, on demand, without discount, at some established~~
9 ~~place of business in the state, the name and address of which must~~
10 ~~appear on the instrument, and at the time of its issuance and for a~~
11 ~~reasonable time thereafter, which must be at least 30 days, the~~
12 ~~maker or drawer has sufficient funds in, or credit, arrangement, or~~
13 ~~understanding with the drawee for its payment.~~

14 ~~(2) A scrip, coupon, card, or other thing redeemable, in~~
15 ~~merchandise or purporting to be payable or redeemable otherwise~~
16 ~~than in money.~~

17 ~~(b) Where an instrument mentioned in subdivision (a) is~~
18 ~~protested or dishonored, the notice or memorandum of protest or~~
19 ~~dishonor is admissible as proof of presentation, nonpayment, and~~
20 ~~protest and is presumptive evidence of knowledge of insufficiency~~
21 ~~of funds or credit with the drawee.~~

22 ~~(c) Notwithstanding paragraph (1) of subdivision (a), if the~~
23 ~~drawee is a bank, the bank's address need not appear on the~~
24 ~~instrument and, in that case, the instrument shall be negotiable and~~
25 ~~payable in cash, on demand, without discount, at a place of business~~
26 ~~of the drawee chosen by the person entitled to enforce the~~
27 ~~instrument.~~